FILED

(1) 97 • 450 SEP - 9 1997

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Whether a securities industry employee who is raped by her supervisor outside work and reports the assault to her employer has waived her right to a judicial forum and must arbitrate her subsequent claims of workplace retaliation for making the report.

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v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - - - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

Jane D. Hill, by counsel, petitions for a writ of certiorari to review the judgment and opinion of the Kentucky Court of Appeals in this case.

OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at Ky App., 945 S.W.2d 948.

JURISDICTION

The date of the Kentucky Court of Appeals opinion is June 21, 1996 as modified on September 20, 1996. (App. 3a)[1] The Supreme Court of Kentucky denied Hill's peti-

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[1]App. refers to the Appendix of this petition.

tion for discretionary review on June 11, 1997. (App. 1a) This Court's jurisdiction is invoked under 28 U.S.C. 1257.

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 provides:

> "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration of a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

In this case, Jane D. Hill ("Hill"), a Vice President of the investment brokerage firm of J.J.B. Hilliard-W.L. Lyons, Inc. ("Hilliard Lyons"), alleges she was raped by Executive Vice President W. William Brab ("Brab"), while both were attending a convention in New York. She reported the incident to another Hilliard Lyons Executive Vice President, James C. Stone, and Board Chairman Gilbert L. Pamplin, who gave assurances that her complaint would be promptly resolved. However, no remedial action was taken, Brab continued exercising retaliatory authority over her and her job responsibilities were reduced. (App. 4a-5a)

Hill's complaint in Jefferson County Kentucky Circuit Court contained claims of assault and battery, false imprisonment and intentional infliction of emotional distress, along with sexual harassment, retaliation and violation of the equal pay law under Chapter 344 of the Kentucky Revised Statutes. (App. 5a) Brab counterclaimed alleging that Hill's report of the incident to Stone and Pamplin was slanderous.

Hilliard Lyons turned the investigation of Hill's report over to its law firm in October, 1993. The firm, which is now defending Hilliard Lyons against Hill's claims, took more than three months to investigate the report and concluded it could not determine whether Hill consented to Brab's assault. During the period of the investigation, Brab effectively determined Hill's compensation, personally distributed her bonus check, and continued to occupy the office next to her. Although Hill was told she was reporting to Pamplin, he never responded to her requests for job responsibilities or direction and he told her merely to "do whatever it is you do." In early February, 1994 Pamplin required Hill to stand next to Brab in front of the audience at the annual sales meeting and, when she objected, told her if she did not like it she "could just stay home." In March, 1994 Stone came into Hill's office and informed her that the company could put her "in data processing, or the mail room, or out in the branches, we will do whatever we want to." (Complaint, Jefferson Circuit Court, paragraphs 30-49)[2]

The Respondents moved to dismiss Hill's lawsuit and defer the case to arbitration on the basis of *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Gilmer* held that the National Association of Securities Dealers' ("NASD") U-4 form required for persons applying to work in the Securities Industry is a contract under the Federal Arbitration Act, 9 U.S.C. §1, *et seq* ("FAA"). Accordingly, form U-4 and New York Stock Exchange Rule 347 require employees to "arbitrate any dispute", including a statutory civil rights claim, "arising out of the [the employee's] employment or termination of employment." 500 U.S. at 22-24. It is undisputed that Hill signed the U-4 form

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[2]Appendix "A" to Appellant's brief, Kentucky Court of Appeals.

when applying for work at Hilliard Lyons as a broker in 1991.

After briefing and oral argument, the Circuit Court issued an order on February 8, 1995 finding that all Hill's claims arose out of her employment and required the case to be arbitrated. (App. 11a-12a) Upon Hill's motion, to clarify the final and appealable nature of its earlier order, the Circuit Court on March 6, 1995, signed an amended order dismissing the action. (App. 13a) Hill filed a timely notice of appeal.

After briefing and argument, the Court of Appeals issued an order on June 21, 1996 remanding for trial Hill's claims of assault and battery and false imprisonment against Brab, but affirming the arbitration order on her claims of intentional infliction of emotional distress, sexual harassment, retaliation and equal pay violations against all defendants. According to the Court of Appeals, the predicate claims against Brab involving the rape were "independent of the employment relationship" and therefore not arbitrable. However, the remaining claims involving retaliation were arbitrable because they "relate to the alleged action or inaction Hilliard Lyons took as Hill's employer in response to her report of the incident in New York." (App. 8a-9a)

Brab then filed a petition for rehearing or alternatively a request to modify the opinion to clarify his right to pursue in court his counterclaim against Hill alleging slander when she reported the rape to Hilliard Lyons management. On September 20, 1996 the Court of Appeals denied the petition for rehearing but granted the request for modification and made clear Brab's right to pursue on remand his counterclaim against Hill "to the extent [it] relates to the charges by Hill now to be heard in the Jefferson Circuit Court." (App. 9a)

On June 11, 1997 the Supreme Court of Kentucky denied petitions for discretionary review by both Hill and Brab. (App. 1a)

At present, although demoted from her management position, Hill continues to work for Hilliard Lyons as a broker in a branch office.

REASONS FOR GRANTING THE PETITION

A. This Case Presents An Important And Unsettled Question Of Federal Law Requiring Prompt Resolution

1. The legal status of employer mandated arbitration of employment disputes is and will remain unsettled.

Following *Gilmer,* the Courts have with virtual unanimity enforced mandatory arbitration[3] of employment disputes in a variety of situations.[4] There is a strong consensus in favor of Alternative Dispute Resolution in general and arbitration of employment disputes in particular. Yet, there is a vigorous, and growing rejection of *mandatory* arbitration by those institutions vital to the successful private resolution of these disputes. Except for management lawyers writing articles seeking to advise potential clients on how to implement enforceable policies, mandatory arbitra-

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[3]The practice here discussed is most accurately called a mandatory pre-dispute arbitration agreement and waiver of judicial forum. For convenience this practice will be referred to as "mandatory arbitration".

[4]Among the most recent Courts of Appeals decisions to enforce mandatory arbitration agreements are *Cole* v. *Burns Int'l Security Svcs,* 105 F.3d 1465 (D.C. Cir. 1997) and *Great Western Mortgage* v. *Peacock,* 110 F.3d 222 (3d Cir. 1997). It should also be noted that the appellate courts are unanimous that the FAA Section 1 exemption for "contracts of employment" is to be applied narrowly, only to workers actually engaged in interstate commerce. *Great Western, supra,* 110 F.3d at 227.

tion has been strongly criticized by most analysts, the EEOC and recently rejected by even the NASD.

The following recent developments are significant:

On August 7, 1997 the NASD voted to amend its U-4 form to allow securities industry employees either to choose arbitration or reserve the right to file statutory discrimination claims in court.[5] The text of the proposed rule is still being drafted, but will be effective one year after it is approved by the Securities and Exchange Commission.[6] The SEC commissioners have stated they welcome the change.[7] This action raises substantial questions about the premise in *Gilmer* that mandatory arbitration can fairly resolve employment claims, when the very institution approved by this Court as properly requiring the process subsequently declines the designation.

On July 10, 1997 the Equal Employment Opportunity Commission reaffirmed its view in a detailed policy statement that mandatory arbitration as a condition of employment is "contrary to fundamental principles" of the federal civil rights laws.[8] The basis of the EEOC's criticism was essentially that mandatory arbitration (1) would inhibit the development of civil rights laws through public decision making and (2) contains inherent biases against claimants.[9] Accordingly, although the EEOC strongly supports

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[5]9 Empl. Discrimination Rep. (BNA) No. 7 at 214 (August 13, 1997).

[6]9 Empl. Discrimination Rep. (BNA) No. 9 at 323-4 (August 27, 1997).

[7]*Id.*

[8]EEOC Policy Statement on Mandatory Arbitration, 9 Empl. Discrimination Rep. (BNA) No. 3 at 87-92 (July 16, 1997).

[9]*Id.*

voluntary arbitration, it intends to continue to challenge mandatory arbitration as unlawful.[10]

On May 21, 1997 the National Academy of Arbitrators adopted a statement opposing mandatory arbitration as a condition of employment for resolving statutory claims.[11]

In January, 1995 the "Dunlop Commission" issued a report strongly endorsing voluntary arbitration to settle employment disputes after they arose, but rejecting mandatory arbitration.[12]

Numerous arbitrators have written articles critical of mandatory arbitration as being fundamentally unfair and inimical to the voluntariness which is crucial to the viability of the process.[13]

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[10]*Id.*

[11]8 Empl. Discrimination Rep. (BNA) No. 23 at 758 (June 4, 1997).

[12]U.S. Dep'ts of Labor and Commerce, Commission on the Future of Worker- Management Relations, Report and Recommendations (December 1994) at 33.

[13]*See e.g.*, Rabin, *The Role of Government in Regulating the Workplace*, 13 Lab. Law. 1, 17 (Summer 1997) ("It is hard to think honestly and clearly about private systems of dispute resolution when the Court tells us blithely that Mr. Gilmer made a free choice to submit all his disputes to arbitration."); Siegel, *Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes*, 13 Lab. Law. 87, 98 (Summer 1997); Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1, 52 (Fall 1996); Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe*, 14 Hofstra Lab. L.J. 245, 262 (Fall 1996); Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U.Ill. L. Rev. 635; Cooper *Where Are We Going With Gilmer? - Some Ruminations on the Arbitration of Discrimination Claims*, 11 St. Louis U. Pub. L. Rev. 203 (1992).

Thus, mandatory arbitration has been rejected by both the federal agency responsible for the enforcement of the civil rights laws and those most knowledgeable about the arbitration process—the neutral professional arbitrators themselves.

Simultaneously, however, there has developed a consensus among these same institutions about most of the basic procedures necessary to ensure a fair hearing in employment disputes. In 1995 a Protocol[14] was drafted by lawyers from both sides of the debate and endorsed by all the private organizations listed above as well as the Society of Professionals in Dispute Resolution, the officers of the Labor Law Section of the American Bar Association, the American Civil Liberties Union and the Federal Mediation and Conciliation Service.[15] The Protocol reflects standards regarding the employee's right to representation, discovery, arbitrator qualifications and remedies. However, the drafters of the Protocol were unable to agree on whether to endorse or condemn mandatory arbitration and took "no position on the timing of agreements to mediate/arbitrate statutory employment disputes, though it agrees such agreements [should] be knowingly made."[16]

In May, 1997 the American Arbitration Association amended its Rules of Procedure which, although continuing to accept cases arising under mandatory systems, now require such programs to be consistent with the AAA's own Rules and the Protocol.[17]

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[14]A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Disp. Res. J. Oct-Dec. 1995 at 37. (hereinafter the "Protocol").

[15]*Id.*

[16]*Id.* at §A (Pre-or Post-Dispute Arbitration).

[17]8 Empl. Discrimination Rep. (BNA) No. 23 at 778-80 (June 4, 1997).

It should be emphasized that the Protocol and other private procedural codes do not have any legal force and cannot be imposed on any employer. Indeed, in *Gilmer*, the employee's procedural rights were substantially less than under these procedures.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 34, 51 (1974), this Court found it "clear that there can be no prospective waiver of an employee's [Title VII] rights." While *Gilmer* rejects *Alexander's* holding that these rights include the right to a judicial forum, it did not otherwise question this premise. *Gilmer* did not address in any analytical way the issue of a knowing and voluntary pre-dispute waiver.

As a matter of both general law and civil rights law, waivers must be knowing and voluntary. *Prudential Insurance Co.* v. *Lai*, 42 F.3d 1299 (12th Cir., 1994), cert. denied 116 S.Ct. 61 (1995) However, no appellate court has yet fully explored the issue as it relates to mandatory arbitration agreements.

The core of the argument against mandatory arbitration is that it cannot, as a matter of fundamental fairness, reflect a knowing and voluntary relinquishing of an employee's right to go to court. As counsel for the EEOC has stated, waiver of a judicial forum simply cannot be truly knowing before a dispute has arisen or truly voluntary if obtained as a condition of employment.[18] The usual response to this argument is that the agreement under consideration meets the *Gilmer* test that there was no fraud or coercion and sometimes recites Plaintiff's business sophistication and education.[19] Yet, it seems clear that waiver

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[18]8 Empl. Discrimination Rep. (BNA) No. 12 at 372 (March 19, 1997).

[19]*See.* e.g. *Great Western Mortgage* v. *Peacock*, 110 F.3d 222 at 229 (3d Cir. 1997).

of the right to a judicial forum should be based on something more than the absence of fraud. The real issue is whether it is necessary for an employee to truly support the arbitration process or whether it is legally sufficient for her merely to know she must arbitrate any claims under procedures dictated by her employer if she wants to be hired or continue working.

Given the forceful and entrenched opposing views on mandatory arbitration, it is respectfully submitted there will be no workable system of private arbitration of employment disputes any time soon. It is virtually certain that court challenges to mandatory arbitration and its attendant procedural infirmities will continue. Therefore, this Court should promptly address the question of whether mandatory arbitration agreements are permissible as a condition of employment under the FAA.

2. Truly voluntary arbitration of employment disputes is being hindered.

As observed earlier, there is consensus both on the desirability of voluntary arbitration of employment disputes and the essentials of the due process rights necessary in such a system.[20] Accordingly, it is proper to ask if mandatory arbitration is necessary to achieve the goal of fair and effective private resolution of employment disputes. Analysis reveals that voluntary, post-dispute arbitration is a workable, self regulating mechanism with all the benefits of mandatory arbitration and none of its drawbacks.

The advantages of mandatory arbitration are generally said to be that it is a faster, cheaper alternative to litigation. Yet, voluntary, post-dispute arbitration has both these advantages, and is probably faster and cheaper since there

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[20]*See*. p. 8, *supra*.

is no need to litigate over arbitrability or other such questions. The real difference between mandatory and voluntary arbitration is the procedural advantage, real or perceived, the employer enjoys in a mandatory system. Both the EEOC and pro-management writers indicate that mandatory arbitration results in outcomes more favorable to management than court actions.[21]

The preservation of a procedural advantage to the party imposing arbitration is a poor reason to insist on adherence to the practice. However, no other reason is readily apparent for insisting on mandatory arbitration as opposed to voluntary, post-dispute arbitration. For example, the only difference between pre- and post-dispute *mandatory* arbitration is the timing of the imposed arbitration procedure. There is no difference in the employer's ability to select the procedural details. Yet, no one even suggests it would be acceptable for an employer to require an employee to adhere to a mandatory arbitration procedure *after* the dispute arises. But the problem with post-dispute mandatory arbitration is precisely the same as pre-dispute: the employee is required to accept the practice as imposed in order to keep her job. So long as the employee's only choice is either to accept the procedure, or forfeit her

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[21]See, EEOC Policy Statement, *supra* n. 8 at 90-2. *See also* Bompey, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21, 65 (Summer 1997) in which a survey of 337 awards representing all available NASD and NYSE awards involving discrimination claims since 1991 was conducted by a law firm representing management. Employees prevailed on at least one of their claims in only 42% of the cases and the awards "tend to be low—often less than six figures." *Id.* at 66. The survey concluded that "employers stand a greater chance of success in arbitration than in court before a jury." *Id.* Perhaps potential claimants recognize this fact, which would account for the suprisingly small number of arbitration awards in the securities industry since *Gilmer*, and suggests a rejection of the mandatory arbitration process by employees.

job, there will continue to be litigation over mandatory arbitration.

It is to be expected that any party to a dispute will seek a procedural advantage if one is available. When the system provides for effective procedural control by one party to be imposed on a "take it or leave it" basis on the other, the only results can be either continuing procedural disputes or a rejection of the process.

Voluntary post-dispute arbitration, in contrast, has none of these disadvantages. By definition, the employee opts to arbitrate her dispute after the claim has ripened with full knowledge of her legal options, and most likely after consulting counsel. Litigation over arbitrability and other procedural details would be virtually nonexistent since they would be specifically agreed upon prior to submission to arbitration.

This Court has, over the past thirty-five years, struggled with limited success to define the test by which courts determine arbitrability, i.e. whether the parties agreed to arbitrate the merits of a dispute. Two recent cases indicate this Court is still struggling. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) An arbitration procedure which insulates courts from arbitrability determinations is a significant benefit.

If arbitration of employment disputes will be as beneficial as everyone says, there should be nothing wrong with requiring that both sides agree to it after the dispute has arisen. To permit an employer to impose manadatory arbitration for a perceived procedural advantage is counterproductive and inhibits development of the process.

B. Mandatory Arbitration Is Clearly Unworkable In This Case

The practical problem with a mandatory arbitration as currently imposed is illustrated in a concrete way by the

nightmare Hill faces in this case. Because she signed the required U-4 form in order to be employed in 1991, she supposedly agreed to arbitrate her 1994 claim of top management's conspiracy to stonewall her report of their colleague Brab's sexual assault.

This dispute will be decided by white males, involved with the securities industry, over age sixty, with little or no experience in employment law.[22] There will be limited discovery, the decision will not be published and can be set aside only on a showing of "corruption, fraud or misconduct."[23]

Hill's allegations involve serious wrongdoing by the top executives of a prominent Regional brokerage firm who are known, at least casually, by the arbitrators who will hear her case. The safeguards of the ABA Protocol have not been adopted and there is no incentive to do so.

However, after three years of litigation, she may now pursue her independent tort action for rape against Brab in court, thus further complicating her options and draining her resources.

Contrast this existing situation to a voluntary, post-dispute arbitration procedure. Hill would have the choice either to invoke arbitration or take her claims to court. Presumably, the due process protocol would be in effect, or if not, Hill would have some leverage to insist upon any procedural safeguards she deems necessary. If voluntary arbitration is agreed upon, then the advantages of speed

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[22]U.S. Government Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes, GAO/HEHS-94-17, 12 (Mar. 1994) Neither the NASD or New York Stock Exchange has implemented any procedural safeguards to address the concerns raised in this report. Bompey, *supra* n. 21 at 67.

[23]9 U.S.C. §10 (1994).

and efficiency follow automatically and there is no concern about litigation over arbitrability. If the parties do not agree to arbitration, although there are powerful reasons to do so, Hill's court action would likely be over by now. In addition, the Respondents would have greater reason to settle the dispute if faced with the prospect of a judicial forum instead of private arbitration where they have a procedural advantage.

Clearly, voluntary, post-dispute arbitration is the only workable system in this case.

C. Hill's Claims Of Workplace Retaliation Are Not Arbitrable Because They Arise Out Of A Sexual Assault Unrelated To Her Employment

The Kentucky Court of Appeals permitted Hill's claims of sexual assault and false imprisonment against Brab to proceed in a judicial forum because they were "independent of the employment relationship." Clearly, being raped by one's boss does not "arise out of" one's employment and the determination of such a claim by a panel of securities industry arbitrators is ridiculous on its face.

A more difficult issue involves the treatment of the claims arising after Hill reported her assault. Hill alleges essentially that Brab and his fellow members of the Board of Directors conspired to demote and embarrass her in her job because she reported the incident. Brab counterclaimed alleging that Hill's report was slanderous. The Court of Appeals held Hill's retaliation claims against the company, Brab and his colleagues were arbitrable because they "relate to the action or inaction Hilliard Lyons took as an employer in response to her report."

This treatment by the Court of Appeals is erroneous because it ignores the relevant contract language with respect to arbitration and court decisions interpreting that language. The retaliation claims "arose out of" Brab's alleged assault which was held to be nonarbitrable.

This Court's core teaching, not recognized by the Court of Appeals, is that judicial arbitrability determinations must be firmly grounded in the specific terms of the contract requiring arbitration. Thus, because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit." *AT&T Technologies, Inc.* v. *Communications Workers of Amer.*, 475 U.S. 643, 648 (1986). The FAA makes arbitration agreements "as enforceable as other contracts, but not more so." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)

The principle of the primacy of the contract's terms is unquestionably the continuing cornerstone in FAA cases. In *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) this Court considered whether arbitrators in securities industry cases were permitted to award punitive damages. This Court's discussion began by observing that, notwithstanding the federal policy favoring arbitration, "courts are bound to interpret contracts in accordance with the expressed intention of the parties—even if the effect of those intentions is to limit arbitration." 514 U.S. at 58. Thus, the determination "comes down to what the contract has to say about the arbitrability" of the claim. *Id.*

The flaw in the Court of Appeals' analysis in this case is its failure to give effect to the relevant contract language. It attempts to distinguish the federal appellate cases interpreting that language and adopting the "job performance" test on the ground those cases dealt with post termination claims while Hill's claims arose during her employment. Yet, the relevant contract language is not confined to post termination claims, and restricts arbitration to disputes "arising out of employment or termination of employment." There is simply no contractual or legal reason to limit the "job performance" test to post termina-

tion disputes. The fact that most disputes involve termination of employment is irrelevant to the consideration of whether a dispute arises out of employment. No principled basis exists to use a different test in pre and post termination claims.

The infirmity of the Court of Appeals' analysis is most clearly seen in its treatment of Respondent Brab's request to modify its opinion. At the hearing before the Circuit Court, Brab agreed to arbitrate his counterclaim against Hill alleging slander when she reported the rape to top Hilliard Lyons management. After the Court of Appeals' opinion permitting Hill to pursue her rape claims against him, Brab requested that the court make clear his right to pursue the counterclaim against Hill in Circuit Court. The Court of Appeals granted the request and modified its opinion allowing him to pursue his counterclaim as part of the action on remand.

The anomalous effect of the modified order is to allow Brab to sue Hill in court for slander because she reported his conduct to Hilliard Lyons, yet Hill must arbitrate the company's actions retaliating against her for making that very report. Does Hill's allegedly slanderous report to Hilliard Lyons of Brab's action arise out of employment any less than the company's retaliation against her for making the report? Surely not.

It is respectfully submitted that these analytical problems are eliminated by a careful consideration of the contract language as required by this Court. Under the FAA, the term "arising out of" is more restrictive for the purpose of compelling arbitration than the term "relating to". *Tracer Research Corp.* v. *National Environmental Services Company*, 42 F.3d 1292, 1295 (9th Cir. 1994); *Mediterranean Enterprises, Inc.* v. *Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983) The Court of Appeals' analysis, that Hill's sexual harassment claims arise out of her employment because

they "relate to" the Company's actions taken in response to her report, is therefore wrong as a matter of law. Unlawful conduct plainly can "relate to" a person's employment, but not constitute a dispute "arising out of" that employment.

The language of the contract requires inquiry into the cause of the dispute. Clearly, the cause of this dispute was the alleged rape which the Court of Appeals has held to be nonarbitrable. It necessarily follows, then, that the rape is the cause of the alleged retaliation. Hill's job performance has, in any event, never been claimed to be a factor in the retaliatory conduct against her. If the retaliation claims do not arise out of the rape, what do they arise out of?

It may well be that the *effect* of Hill's report of Brab's rape was workplace retaliation. But this is not the issue. The requisite inquiry for the purpose of judicial determination of arbitrability is the *cause* of the dispute. There can be no doubt that the real cause of this dispute is Brab's alleged rape.

Before *Gilmer*, the standard developed by the federal appellate courts for determining whether a dispute arises out of employment in the securities industry was whether the claim's resolution "depends upon evaluation of a party's performance either as a broker or as an employer of brokers during the time of the contractual relationship." See, *Fleck* v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1053 (2nd Cir. 1989). Nothing in *Gilmer* suggests this test was being modified or overruled. This Court merely held that the statutory nature of a claim did not prevent its being arbitrated pursuant to a contract under the FAA.

The Court of Appeals decision, holding claims arbitrable because they "relate to" employer actions taken *qua* employer, effectively interprets the agreement as requiring arbitration of any dispute with the employer. But the contract does not say "any dispute with an employer" or

"any dispute relating to employment". The contract says "any dispute arising out of employment". This latter term has been authoritatively interpreted to limit arbitration to those claims whose resolution turns on the claimant's job performance. Its meaning was not discussed or altered in *Gilmer*. The "job performance" test, although broad enough to require arbitration in most employment cases, is not so broad as to encompass claims arising out of a supervisor's rape of a subordinate.

CONCLUSION

The enforcement of mandatory arbitration agreements is unnecessary and counterproductive to establishing a workable system of nonjudicial employment dispute resolution. Employees will not, as a practical matter, accept a system imposed by their employer before a dispute has arisen and in which they have no procedural input.

Voluntary arbitration, entered into after a dispute has arisen, is a viable method of dispute resolution which is being hampered by the current debate. This Court should reject mandatory waiver of a judicial forum in employment disputes as contrary to the Civil Rights laws and the Federal Arbitration Act. At the very least, this Court should require lower courts to follow the terms of the contract regarding arbitrability.

Respectfully submitted,

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September 9, 1997

APPENDIX

SUPREME COURT OF KENTUCKY

96-SC-922-D
(95-CA-898)

JANE D. HILL - - - - - - - - - - - *Movant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.,
JAMES C. STONE, III,
GILBERT L. PAMPLIN, and
WOLFGANG WILLIAM BRAB - - - - - - *Respondents*

AND

96-SC-923-D
(95-CA-898)

WOLFGANG WILLIAM BRAB - - - - - - - *Movant*

v.

JANE D. HILL - - - - - - - - - - - *Respondent*

Jefferson Circuit Court
No. 94-CI-5086

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

ENTERED: June 11, 1997.

/s/ Robert F. Stephens
Chief Justice

COURT OF APPEALS OF KENTUCKY

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - *Appellant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable William Knopf, Judge
Civil Action No. 94-CI-5086

ORDER GRANTING PETITION TO MODIFY OPINION/DENYING REQUEST FOR REHEARING

BEFORE: WILHOIT, Chief Judge; COMBS, and HOWERTON, Judges.

Appellee, Wolfgang William Brab, has petitioned for rehearing and/or modification or extension of this Court's opinion in the captioned case rendered June 21, 1996, to which no response was filed. Agreeing with Brab's request to modify the opinion, it is hereby GRANTED, and the attached pages 1 and 9 are ORDERED substituted for pages 1 and 9 and page 10 added to our original opinion.

The request for rehearing is hereby DENIED.

ENTERED: September 20, 1996

/s/ Anthony M. Wilhoit
Judge, Court of Appeals

RENDERED: JUNE 21, 1996; 2:00 P.M.
TO BE PUBLISHED
MODIFIED: SEPTEMBER 20, 1996; 10:00 A.M.

COURT OF APPEALS OF KENTUCKY

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - *Appellant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable William Knopf, Judge
Civil Action No. 94-CI-5086

OPINION—AFFIRMING IN PART; VACATING AND REMANDING IN PART

BEFORE: WILHOIT, Chief Judge; COMBS, and HOWERTON, Judges.

HOWERTON, JUDGE. Jane Hill appeals from an order of the Jefferson Circuit Court dismissing her claims of sexual assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of the equal pay law under KRS Chapter 344. The circuit court determined that the claims arose out of Hill's employment and were therefore subject to mandatory arbitration. We vacate the order as to the dismissal of the allegations of sexual assault and battery and false imprisonment against Wolfgang William Brab, and we remand for further proceedings. As to the dismissal of the other charges and parties, we find no error and affirm.

Hill was employed by Hilliard Lyons as a stockbroker in February 1991, and was elected to the position of Vice-President of Branch Administration and Marketing in September of 1993. As a condition of her employment, Hill was required to register as a securities representative with self-regulatory organizations, including two stock exchanges, by completing and signing Form U-4, "Uniform Application for Securities Industry Registration or Transfer." By signing the form, Hill agreed to submit any dispute, claim, or controversy between Hilliard Lyons and herself to arbitration. Specifically, Hill agreed to the following provision:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm or a customer or any other person, that is required to be arbitrated under rules, constitutions or bylaws of the organizations listed in item 10 as may be amended from time to time and that any arbitration award entered against me may be entered as a judgment in a court of competent jurisdiction.

The "organizations listed in Item 10" are the American Stock Exchange, the National Association of Securities Dealers, and the New York Stock Exchange, all of which Hilliard Lyons is a member. Rule 347 of the New York Stock Exchange Rules provides:

> Any controversy between a registered representative and any member or member organization arising out of employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any party, in accordance with our arbitration procedure prescribed elsewhere in these rules.

The National Association of Securities Dealers has a similar rule.

Hill alleged that in October 1993, she was raped by her supervisor, W. William Brab, while they were attending a convention in New York. She further alleged that Brab threatened her that if she told anyone of the incident, she

would lose her job. Hill eventually reported the alleged incident to a Hilliard Lyons Executive Vice-President, James C. Stone, and the Board Chairman, Gilbert L. Pamplin, and was given assurances that her complaint would properly be resolved. However, following the meeting, Hill alleged that she had to continue working in the office next to Brab, that she was required to appear at an awards presentation with Brab, and that she was given a bonus which was substantially less than she had been promised upon accepting the position. Hill maintained that Brab continued to exercise retaliatory authority over her and that her job responsibilities were reduced.

Hill initially filed a charge with the Equal Employment Opportunity Commission (EEOC) in Louisville, alleging sexual harassment and retaliation against Hilliard Lyons and Brab. As a result, Hill stated that her job responsibilities were further reduced and many of her responsibilities were reassigned to a male counterpart. Subsequently, in September 1994, Hill filed an action in the Jefferson Circuit Court against Hilliard Lyons, Brab, Stone, and Pamplin, claiming assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of the equal pay law under KRS Chapter 344. The appellees collectively moved to dismiss and defer the case to arbitration on the basis of *Gilmer* v. *Interstate/Johnson Lane Cory.*, 500 U.S. 20, Ill S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Following oral argument, the circuit court entered an order finding that Hill's claims arose out of her employment at Hilliard Lyons and were therefore subject to the mandatory arbitration agreement signed by Hill. On February 8, 1995, the court stayed the action pending completion of the arbitration proceedings. However, on March 6, the court entered an order dismissing all of Hill's claims. This appeal ensued.

Hill argues that the court erred in ruling that her claims were subject to mandatory arbitration under *Gilmer*, because they did not arise out of her employment and are

therefore outside the scope of the arbitration agreement. At the outset, we recognize that Hill has the burden of showing that her claims are not subject to arbitration.

> Congress has delegated broad powers to self regulatory organizations within the securities industry to police the conduct of their members. This broad legislative delegation of power strengthens the presumption that disputes among members of such organizations and individuals associated therewith are arbitrable.

Spellman v. *Securities, Annuities & Ins. Services, Inc.*, 8 Cal. App.4th 452, 464, 10 Cal. Rptr.2d 427, 435, *modified* 8 Cal. App. 4th 1198 (1992) (citing to *Francis* v. *Marshall*, 661 F.Supp. 773 (D. Mass. 1987)).

Further, whenever an arbitration agreement exists, the Federal Arbitration Act establishes that, as a matter of law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983); See *also Asplundh Tree Co.* v. *Bates.*, 71 F.3d 592 (1995).

The United States Supreme Court in *Gilmer* v. *Interstate/Johnson Lane Corp., supra*, held that agreements in the securities industry by brokers to arbitrate claims arising out of employment are governed exclusively by the Federal Arbitration Act (FAA). Gilmer was a registered security representative with the New York Stock Exchange, who also had signed a Form U-4 as a condition of employment. When he was terminated at age 62, Gilmer filed suit alleging age discrimination in violation of the Age Discrimination in Employment Act. The Supreme Court determined that Gilmer's claim was subject to mandatory arbitration pursuant to the FAA.

The *Gilmer* holding and analysis has been consistently applied to actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as discrimination cases under state law. The Sixth Circuit in *Willis* v. *Dean Witter Reynolds. Inc.*, 948 F.2d 305 (6th Cir. 1991), ordered arbi-

tration of sexual harassment and sexual discrimination claims under Chapter 344 of the Kentucky Revised Statutes and Title VI, along with Willis, common law tort claims of outrage and breach of contract. Willis indicated that the "outrage" occurred in the workplace. Likewise, in *Bender* v. *A.G. Edward & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992), the Eleventh Circuit relied on the rationale in *Gilmer* in holding that a stockbroker was required to arbitrate her sexual harassment claims under Title VII pursuant to her registration application with the National Association of Securities Dealers and the New York Stock Exchange. The court also ordered arbitration of Bender's state law claims for battery, intentional infliction of emotional distress, and negligent retention. The Bender opinion did not reveal where the battery occurred or the nature of the offense.

Hill argues that *Gilmer* did not affect the prior line of cases interpreting the "arising out of . . . employment" language of Rule 347. In support, Hill relies on *Morgan* v. *Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984), in which the Eighth Circuit determined that a claim must involve some connection with "customers or securities agencies" or a "significant issue of . . . [plaintiff's] job performance" to require mandatory arbitration. Id. at 1167. *See also Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987); *Fleck* v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2nd Cir. 1989); *Aspero* v. *Shearson Am. Express*, Inc., 768 F.2d 106 (6th Cir. 1985).

A thorough reading of the above decisions convinces us that Hill's reliance is somewhat misplaced. *Morgan* and subsequent decisions all espouse the standard by which to determine whether post-employment claims are subject to arbitration. In recognizing the difficulty in determining which post-employment claims should be subject to mandatory arbitration, the 2nd Circuit in *Fleck* relied on the *Morgan* test that there must involve "significant aspects of the employment relationship." These decisions are, to some extent, distinguishable from Hill's claims which arose during her employment with Hilliard Lyons.

We have no difficulty in concluding that all of Hill's claims against Hilliard Lyons, Stone, and Pamplin arose out of her employment. Hill's allegations of sexual harassment, retaliation, and violation of the equal pay law all relate to the alleged action or inaction Hilliard Lyons took as Hill's employer in response to her report of the incident in New York. These charges against Brab are likewise subject to arbitration. However, we cannot agree that Hill's other allegations against Brab arose out of her employment. The only connection those torts or crimes have with Hill's employment is that they were committed by a co-worker and occurred while on a business trip.

The circuit court stated, and we agree, that rape does not ordinarily arise out of the employment context. Nevertheless, the trial court dismissed all claims for two reasons. Although Hill's tort claims of assault and battery and false imprisonment arise most immediately from Brab's conduct, the ensuing chain of events and the course of action Hill chose to pursue were made in direct connection with her employment. Hill elected not to pursue criminal charges against Brab or to sue him personally and exclusively. Instead, she originally sought recourse through the EEOC. It is cogent that the EEOC's sole domain is employment-related matters, yet Hill now contends that her claims do not arise out of her employment. The circuit court was also persuaded that Hill's allegations against Brab were so interwoven with those against the other appellees that all claims could be found to have arisen from her employment. The video record indicates that Judge Knopf struggled with this problem, but finally concluded that the case should not be prosecuted piecemeal. All claims were to be subjected to arbitration.

We, too, have struggled with the same problems and reasoning, but we nevertheless conclude that, in this situation, the alleged offenses by Brab of rape, assault and battery, and false imprisonment were erroneously dismissed. They simply cannot be considered as non-actionable in court as anything "arising out of the employment."

The mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative. What Brab is accused of doing is independent of the employment relationship. We will not expand the arbitration agreement merely for the sake of efficiency. In this case, it is the Federal Arbitration Act and the contract that can be said to require a "piecemeal" resolution. *See Moses* v. *Cone Memorial Hosp.* v. *Mercury Constr. Corp., supra.*

In affirming part of the decision that Hill's claims must be subject to arbitration, we have not denied her access to a court. She can pursue her claims which are subject to arbitration, and if the result is somehow legally deficient, she may return to court for review. *Mitsubishi Motors Corp.* v. *Sale Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

We note that the order of the Jefferson Circuit Court, from which this appeal was taken, provided in part, "[b]y agreement of the Defendant, Wolfgang William Brab, his counterclaim shall be disposed of in a forum similar to that handling the Plaintiff's claims." Brab had filed a counterclaim against Hill for slander. To the extent that his counterclaim relates to the charges brought by Hill now to be heard in the Jefferson Circuit Court, it shall remain a part of the action on remand.

Accordingly, the order of the Jefferson Circuit Court dismissing Hill's action is vacated to the extent that it dismissed her personal tort claims of rape, assault and battery, and false imprisonment against Brab and remanded for further proceedings against him. As to the dismissal of the other charges and parties, the decision is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:
Ivan H. Rich, Jr.
Louisville, KY

BRIEF FOR HILLIARD LYONS:
Walter L. Sales
Thomas M. Williams
Louisville, KY

ORAL ARGUMENT FOR
HILLIARD LYONS:
Walter Sales
Louisville, KY

BRIEF AND ORAL ARGUMENT
FOR W. WILLIAM BRAB:
Eleanore M. Garber
Louisville, KY

RENDERED: JUNE 21, 1996; 2:00 P.M.

JEFFERSON CIRCUIT COURT

DIVISION NINE (9)

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - - *Plaintiff*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - *Defendants*

ORDER—Entered February 8, 1995

This action is before the Court for a ruling on the motions of the Defendants to dismiss or in the alternative to stay proceedings. On the 6th day of February, 1995, oral arguments were heard by the Court and recorded on video tape 30-9-95 VCR 009 (10:14 10:55) . At the oral arguments, Ivan H. Rich, Jr. , appeared for the Plaintiff, Jane D. Hill, Scott T. Wendelsdorf, appeared for the Defendants, J.J.B. Hilliard, W. L. Lyons, Inc., James C. Stone, III, and Gilbert L. Pamplin, and Eleanore M. Garber, appeared for the Defendant, Wolfgang William Brab.

The Court having reviewed and considered the memorandums of law filed in the record, heard oral arguments, and being otherwise sufficiently advised, finds that the claims made in this lawsuit by the Plaintiff, Jane D. Hill, are subject to the mandatory arbitration agreement signed and agreed to by the Plaintiff known as Form U-4, "Uniform Application for Securities Industry Registration or Transfer". Under the specific facts of this case and applicable law, this Court finds that all of the Plaintiff's claims arise out of her employment at J.J.B. Hilliard, W.L. Lyons, Inc. and thus must be submitted for mandatory arbitration. *Gilmer* v. *Interstate/Johnson Lane Corporation,* 500

U.S. 20, 114 L.Ed 2d 26, 111 S.Ct. 1647 (1991). By agreement of the Defendant, Wolfgang William Brab, his counterclaim shall be disposed of in a forum similar to that handling the Plaintiff's claims.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that all claims in this action are hereby STAYED pending the completion of mandatory arbitration between all parties to this action.

This is a final and appealable Order, there being no just reason for delay.

Entered: February 8, 1995

/s/ William L. Knopf
William L. Knopf, Judge

c: Ivan H. Rich, Jr.
Scott T. Wendelsdorf
Eleanor M. Garber

JEFFERSON CIRCUIT COURT

DIVISION NINE (9)

94-CI-05086

JANE D. HILL - - - - - - - - - - - *Plaintiff*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - *Defendants*

ORDER—Entered March 6, 1995

This Court, being fully advised in the premises, hereby amends its Order of February 8, 1995, staying this action. Defendants' Motions are granted. This is a final and appealable order and there is no just cause for delay.

/s/ Illegible
Judge, Jefferson Circuit Court

Date: March 6, 1995